Oklahoma Law Review

Volume 38 | Number 4

1-1-1985

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STATUTE OF LIMITATIONS PROBLEMS IN PRODUCTS LIABILITY CASES—EXERCISES IN PRIVITY, SYMMETRY, AND REPOSE

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As the law of civil liability for defective products has developed, it has presented prospective plaintiffs with three principal theories by which they may seek recovery: negligence, breach of warranty, and strict liability in tort.[1] In selecting a theory, plaintiffs will often want to consider, among other factors, the limitation period on bringing an action under each possibility; but the plaintiff will also have to face many unsettled limitations questions in making the selection. This is particularly true when choosing between breach of warranty and strict liability in tort.[2] This article will discuss those questions.

Statute of Limitations in Torts

The greatest agreement in this area is found as to the applicable statute of limitations for products liability actions based on negligence or on strict liability in tort. The relevant statute on tort actions will govern, not the statute on contract or breach of warranty claims.[3] Thus, in *Anderson v. Fairchild Hiller Corp.*,[4] the plaintiff sued under a strict liability in tort theory after being injured by the rotor blade of a helicopter manufactured by the defendant. The federal court applied Alaska's two-year statute of limitations on personal injury claims, giving two reasons for choosing this statute over the one applicable to warranty claims. First, although strict liability for defective products may have originated in warranty theory, breach of warranty was

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1. *See* W. PROSSER & R. KEETON, TORTS 694 (5th ed. 1984). *See generally* Annot., 52 A.L.R.3d 101 (1973); Annot., 13 A.L.R.3d 1057 (1967). In two jurisdictions—Delaware and Massachusetts—the Uniform Commercial Code's warranty provisions will ordinarily offer the only remedy in a products liability case, precluding any tort recovery. *See* Cline v. Prowler Indus., 418 A.2d 968 (Del. 1980); Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964 (1978); Swartz v. General Motors Corp., 375 Mass. 628, 378 N.E.2d 61 (1978). *See generally* Braden v. Hendricks, 695 P.2d 1343, 1351 (Okla. 1985).

2. *See* McNichols, *The Kirkland v. General Motors Manufacturers' Products Liability Doctrine—What's in a Name?*, 27 OKLA. L. REV. 347, 368-77 (1974). *See generally* Symposium, *Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 62 (1970). There are usually no particular problems involving the statute of limitations in products cases based on negligence. Therefore, this article will concentrate on the warranty and strict tort theories.

3. *See* Annot., 91 A.L.R.3d 455 (1979). *See generally* Comment, *The Statute of Limitations in Strict Product Liability Actions*, 24 BUFFALO L. REV. 477 (1975); Note, *Products Liability—Statute of Limitations—Tort Statute of Limitations Applied in Strict Products Liability Actions*, 43 FORDHAM L. REV. 322 (1974).

4. 358 F. Supp. 976 (D. Alaska 1973).

itself originally a form of fraud, sounding in tort, and the tort statute was thus appropriate. Second, in its present form, strict liability in tort is closer to negligence than to warranty because no contract is required and liability generally cannot be disclaimed. Other courts have given similar reasons. An Arizona case applied the tort statute on "injuries to the person" to a plaintiff in a strict liability action, noting that privity of contract is not required and that the tort statute is therefore more appropriate than the contract statute.[5]

Perhaps the most cited case on the question of the applicable statute of limitations in strict-tort liability cases is *Victorson v. Bock Laundry Machine Co.*,[6] a New York opinion overruling earlier authority.[7] The statute covering actions for personal injury and property damage was held to be the relevant one. The court observed that strict tort liability does not arise from the will or intention of the parties but is based on considerations of social policy and may extend to those, such as innocent bystanders, having no contractual dealings with the manufacturer or other defendants. Thus, the court concluded that because the action sounded in tort it should be governed by the same limitation period as applies to negligence actions. This holding has been discussed and followed in later New York cases.[8] Similar reasoning is found in a Vermont case that observed that if the absence of a contractual relationship between the parties does not bar recovery in strict tort liability, it is difficult to understand how the liability can be considered contractual in nature.[9] The action was also said to sound in tort. However, the Vermont court added that the applicable statute should be determined by the nature of the injury (here, personal injury), not the legal theory used in stating the claim. The Oklahoma Supreme Court has similarly regarded strict liability in tort as being independent of contract and thus governed by the tort statute of limitations.[10]

5. Wetzel v. Commercial Chair Co., 18 Ariz. App. 54, 500 P.2d 314 (1972).

6. 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975), noted 40 ALB. L. REV. 869 (1976). *See* LaSalle, *Products Liability: Tort or Contract—A Resolution of the Conflict?* 21 N.Y.L.F. 587 (1976).

7. Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969), where the court had treated strict liability in tort and breach of implied warranty as merely different ways of designating the same cause of action and had held that an action predicated on either theory would be governed by New York's six-year statute of limitations for contract actions, not the three-year statute for torts. *See* O'Keefe v. Boeing Co., 335 F. Supp. 1104 (S.D.N.Y. 1971), a federal case applying the *Mendel* rule.

8. *See, e.g.*, Ribley v. Harsco Corp., 57 A.D.2d 234, 394 N.Y.S.2d 741 (Sup. Ct. 1977); Murphy v. General Motors Corp., 55 A.D.2d 486, 391 N.Y.S.2d 24 (Sup. Ct. 1977). Some authority even prior to *Victorson* had applied the three-year tort statute to strict tort claims. *See* Simmons v. Albany Boys Club, Inc., 80 Misc. 2d 19, 362 N.Y.S.2d 113 (Sup. Ct. 1974); Lewis v. John Royle & Sons, 79 Misc. 2d 304, 357 N.Y.S.2d 601 (Sup. Ct. 1974), *aff'd on other grounds*, 46 A.D.2d 304, 362 N.Y.S.2d 262 (Sup. Ct. 1974).

9. Kinney v. Goodyear Tire & Rubber Co., 134 Vt. 571, 367 A.2d 677 (1976).

10. Hester v. Purex Corp., 534 P.2d 1306 (Okla. 1975); O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614 (Okla. 1974); Moss v. Polyco, Inc., 522 P.2d 622 (Okla. 1974); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). *See* Nichols v. Eli Lilly & Co., 501 F.2d 392 (10th Cir. 1974).

Also, the Connecticut Supreme Court has concluded that such strict liability claims must be classified as among those "founded upon a tort."[11]

Many cases involving strict tort liability for defective products have summarily concluded that the general tort statute or some more specific tort statute will apply. For example, one Minnesota case involved a plaintiff who alleged that asbestos insulation manufactured by the defendant was unreasonably dangerous and had caused him to develop asbestosis.[12] The court stated without explanation that the statutory period on personal injury actions would apply.[13] The strict liability claim is often combined with claims based on negligence or other tort theories, and the court may be influenced in applying the tort statute by a desire to treat all the counts similarly.[14] Indeed, a court may neglect to state what the theory of the action is, even when it appears to be strict liability in tort, and instead emphasize the nature of the harm suffered, for example, personal injury or property damage.[15] On the other hand, some opinions have stressed the tort nature of the strict liability theory and concluded on that basis that the statutory period should be the same as for negligence.[16] Similarly, when the injury sued on is death, courts may tend automatically to apply the limitation statute applicable to wrongful death because it is apparently most specifically on point.[17]

The chief argument against the application of the relevant tort statute is that strict tort liability should be treated like breach of warranty and should therefore be subject to the Uniform Commercial Code's limitation period, which is four years.[18] This contention, however, has been almost universally

11. Prokolkin v. General Motors Corp., 170 Conn. 289, 365 A.2d 1180 (1976) (strict liability claim held barred by statute of limitations on tort actions). *Accord*, Abate v. Barkers of Wallingford, Inc., 27 Conn. Supp. 46, 229 A.2d 366 (1967). *Cf.* Hornung v. Richardson-Merill, Inc., 317 F. Supp. 183 (D. Mont. 1970) (finding that under Montana law a strict tort claim was governed by the statute applicable to actions based on a liability other than contract).

12. Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155 (8th Cir. 1975) (applying Minnesota law).

13. *Accord*, Raymond v. Eli Lilly & Co., 412 F. Supp. 1392 (D.N.H. 1976) (New Hampshire law); Nelson v. Volkswagen of America, Inc., 315 F. Supp. 1120 (D.N.H. 1970) (same); Tucker v. Capital Mach., Inc., 307 F. Supp. 291 (M.D. Pa. 1969) (Pennsylvania law); G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970). All of these cases apply the statute relating to personal injuries, with little or no discussion.

14. *See* Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973).

15. *See* Roman v. A.H. Robins Co., 518 F.2d 970 (5th Cir. 1975); Chicago & So. Airlines, Inc. v. Volpar, Inc., 54 Ill. App. 3d 609, 370 N.E.2d 54 (1977). *Cf.* Kinney v. Goodyear Tire & Rubber Co., 134 Vt. 571, 367 A.2d 677 (1976) (finding that the action sounded in tort but concluding that even if it did not, the nature of the injury sustained, not the legal theory of the claim, should determine the applicable statute of limitations).

16. *See* Arrow Transp. Co. v. Fruehauf Corp., 289 F. Supp. 170 (D. Or. 1968) (Oregon law); O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614 (Okla. 1974).

17. *See* McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975); Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 168 N.W.2d 177 (1969). *See also* as to Tennessee law, Hargrove v. Newsome, 225 Tenn. 462, 470 S.W.2d 348 (1971), *cert. denied*, 405 U.S. 907 (1972) (statute of limitations on personal injuries applicable to strict tort claim).

18. U.C.C. § 2-725 (1978). In Oklahoma, however, the period is five years. 12A OKLA. STAT.

rejected. Again, one of the best discussions is found in the *Anderson* case from Alaska,[19] where the court noted that the longer Code period is intended to apply only in favor of those who have contracted with the defendant or otherwise satisfied the privity requirement. The court stated that this is because a seller wants to know as soon as possible if a product is defective and causes injuries in order that he may take steps to prevent additional injury and liability. Therefore, a longer period is given those whose identity is known or could readily be discovered, while a shorter period is provided for those whose identity the seller could not know until a lawsuit is filed, thus encouraging prompt filing in the latter situations. Further, the court noted that under the Code, the parties may contract to reduce the period from the four years ordinarily provided to no less than one year. The seller, however, has no opportunity to make such an agreement with those with whom he has not contracted; therefore, it would not be appropriate to give those persons the longer basic period. One New Jersey case emphasized that the Code limitation period is stated to apply to actions "for breach of any contract for sale" and thus could only apply to a suit involving two directly contracting parties or where the plaintiff could qualify under the Code as a third-party beneficiary.[20] Thus, the Code's limitation period cannot possibly apply to all products liability cases. In an even earlier case, the New Jersey court observed that the Code's language indicates that the limitation period was never intended to apply to tort actions between consumers and manufacturers who have not been in a commercial relationship.[21]

As some of the above-cited cases indicate, the argument for rejection of the Code's limitation period is particularly strong where the parties are not in privity. New York, for example, has stressed the lack of prior association between the plaintiffs in a products liability action and the manufacturer they were suing.[22] The court noted that the claims were not based on any alleged nonperformance of an agreement between the parties and that strict tort liability does not arise from or require any contractual relationship between the parties prior to the injury. Indeed, strict tort liability was developed largely as a means of avoiding the privity requirements traditionally associated with breach of warranty actions,[23] and strict tort liability is based, not on any contractual or other relationship between the parties, but on the public policy of making manufacturers and sellers bear the risk of their dangerously defective products.[24]

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§ 2-275 (1981). A few other states have, when adopting the Uniform Commercial Code, specified a period other than four years, usually five or six years. *See* Annot., 91 A.L.R.3d 455, 465 (1979).

19. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

20. Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973).

21. Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968).

22. Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975).

23. *See* Nelson v. Volkswagen of America, Inc., 315 F. Supp. 1120. (D.N.H. 1970).

24. *See* Cinnaminson Twnshp. Bd. of Educ. v. U.S. Gypsum Co., 552 F. Supp. 855 (D.N.J. 1982) (loss could fall within ambit of property damage, rather than merely economic loss, where defect in asbestos allegedly rendered entire ceiling useless).

When Does the Tort Action Accrue?

Closely related to the question of the relevant limitation period in strict tort liability is the issue of when the statutory period starts to run—i.e., when does the action accrue? The general rule is usually stated that the statute runs from the time the injury is suffered by the plaintiff.[25] The date of sale is specifically rejected in favor of the date of the harm.[26] The time at which the injury occurred is a question of fact and, therefore, unless reasonable people could not disagree, is an issue for the jury.[27] Thus, in a case in which plaintiff's hair got caught in the drive shaft of a manure spreader, the statute started to run as of the moment of the resulting personal injury;[28] and in a situation involving an allegedly defective television set that exploded and set fire to the plaintiff's house, the action accrued at the time of the explosion.[29] Again, the courts sometimes emphasize that the rule is the same as that applied to negligence actions.[30] Similarly, for choice-of-laws purposes, the actions are deemed to have arisen at the *place* where the injury occurred.[31]

While the statutory period in strict products liability, as in negligence, generally starts to run at the time of injury, certain exceptions are sometimes recognized.[32] The starting of the statutory period may conceivably be delayed until (1) the plaintiff has discovered or should reasonably have discovered his injury; (2) the plaintiff has discovered or should reasonably have discovered the possible causal connection between the allegedly defective product and his injury; or (3) the plaintiff has discovered or should reasonably have discovered the identity of the potential defendant responsible for the defective product—i.e., the seller or the manufacturer. The first of these possible reasons for delay is the one most commonly recognized: The statute will start to run when the plaintiff's injury is capable of discovery, when it should

25. *See* Tyler v. R.R. Street & Co., 322 F. Supp. 541 (E.D. Va. 1971). *See generally* Annot., 4 A.L.R.3d 821 (1965).

26. Rivera v. Berkeley Super Wash, Inc., 44 A.D.2d 316, 354 N.Y.S.2d 654 (1974). *See* McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975).

27. Federal Mogul Corp. v. Universal Constr. Co., 376 So. 2d 716 (Ala. App. 1979), *cert. denied*, 376 So. 2d 726 (Ala. 1979).

28. Ribley v. Harsco Corp., 57 A.D.2d 234, 394 N.Y.S.2d 741 (Sup. Ct. 1977).

29. Romano v. Westinghouse Elec. Co., 336 A.2d 555 (R.I. 1975).

30. *See* Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968); Singer v. Federated Dep't Stores, Inc., 112 Misc. 2d 781, 447 N.Y.S.2d 582 (1981) (causes of action in negligence and in strict products liability were governed by same statute, which ran from date of injury).

31. Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 403 N.Y.S.2d 185, 374 N.E.2d 97 (1978) (negligence and strict liability causes of action against New York manufacturer of forklift truck used in Virginia accrued in Virginia, where injury occurred). *See* Bruce v. Fairchild Indus., Inc., 413 F. Supp. 914 (W.D. Okla. 1974) (cause of action for defective plane was tortious in origin and arose from the injury rather than the sale of aircraft; thus any Oklahoma activities involving sale could not be used to establish Oklahoma jurisdiction over defendants).

32. *See* McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416 (1981), with a survey of the relevant statutes of limitations of the various states, and of the time they start to run.

reasonably have been discovered by the plaintiff.[33] Thus, one commentator has observed that a consequence of a jurisdiction's adoption of strict tort liability "could be to allow a victim injured by a defective product many years after it was sold to recover on a 'nonnegligence' basis, provided he could prove it was in a defective condition when sold."[34]

Suits against sellers of asbestos, alleging that the asbestos produced asbestosis in the plaintiff, have frequently led to application of the rule that the statutory period starts to run when the plaintiff's harm was discovered, or should reasonably have been discovered, whichever date is earlier.[35] In such a situation, the cause of action accrues when the diagnosis is made, or at such time as it could earlier have been made with reasonable diligence.[36] Similarly, where a chemical spilled on the plaintiff initially produced no perceptible trauma and caused only a mild rash that soon disappeared, it could be found that the plaintiff acted with reasonable diligence even though the plaintiff did not file suit against the chemical manufacturers until over a year after the spill, when the serious effects of the chemical allegedly became apparent.[37] However, there is no unanimous agreement even on this aspect of the "discovery" rule. A Virginia case involved a suit against the manufacturers of power shovels that the plaintiff had operated and maintained.[38] The plaintiff contended that the location of shovel cabs and the composition of the brake and clutch linings had combined to cause his bronchitis, asbestosis, and silicosis. The court held that the cause of action accrued when the plaintiff contracted these conditions, not when he discovered that he had them.

Even if the plaintiff is aware of his injury, he cannot very well sue unless he has some idea of the cause of the injury. Therefore, *some* applications of the "discovery" rule go farther than merely saying that the statute starts to run when the plaintiff discovers or should reasonably discover the injury; some courts also add that the statute will not begin to run until the plaintiff knows or should reasonably know that the allegedly defective product caused

33. *See* R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963); Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183 (D. Mont. 1970).

34. McNichols, *supra* note 2, at 369 n.94, citing Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).

35. *See* Clutter v. Johns-Manville Sales Corp., 646 F.2d 1151 (6th Cir. 1981) (applying Ohio law); Nolan v. Johns-Manville Asbestos & Magnesia Materials Co., 74 Ill. App. 3d 778, 392 N.E.2d 1352 (1979), *aff'd*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981).

36. McKee v. Johns-Manville Corp., 94 Misc. 2d 327, 404 N.Y.S.2d 814 (1978).

37. Pereira v. Dow Chem. Co., 129 Cal. App. 3d 865, 181 Cal. Rptr. 364 (1982) (summary judgment for defendants reversed).

38. Large v. Bucyrus-Erie Co., 524 F. Supp. 285 (E.D. Va. 1981) (applying Virginia law). *Cf.* Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978) (asbestos products manufacturer's liability for injuries to workmen due to prolonged periods of exposure would be apportioned among all products liability insurers during total period of exposure, under the theory that exposure rather than manifestation of disease was the occurrence insured against; applying Illinois and New Jersey law); Wilson v. White Motor Corp., 118 Ill. App. 2d 436, 254 N.E.2d 277 (1970) (cause of action accrues when act causing liability occurs, not when injury takes place; adoption of "known or should have known" rule is within province of legislature).

the injury. In a Pennsylvania case, for example, the plaintiff claimed that her paralysis was caused by the surgeon drilling too deeply into her cervical vertebrae during surgical fusion. The plaintiff sued the doctors and the hospital that had treated her.[39] Those defendants in turn impleaded, under strict tort liability, the manufacturer of the bone cutter used in the operation, pointing to an apparent defect in the cutter. It was held that the statute began to run against the manufacturer when the plaintiff could reasonably have discovered that this defect caused her injury. Similarly, in a federal court case against the manufacturer of the Dalkon Shield, a contraceptive device, the court found that the action had accrued when the plaintiff should reasonably have discovered that she was injured by that product.[40]

Will the courts go still farther and delay the start of the statute until the plaintiff knows or should have known the identity of the prospective defendant? Some courts have indicated they will go this far, as in a Kentucky asbestosis case in which strict tort liability was asserted against the manufacturer of certain asbestos products.[41] The court stated that the action arose when the plaintiff discovered or could reasonably have discovered that he had lung cancer and that it could have been caused by the defendant's product. A federal case applying Oklahoma law included negligence and strict liability counts against the manufacturers of clear plastic meat-wrapping film. The plaintiff alleged that a disability was caused by breathing fumes created by cutting the film with hot wire.[42] The court held that the action accrued when the plaintiff should reasonably have known that she had the condition and that the defendant caused it.

These extensions of the "discovery" rule to situations in which the plaintiff, though aware of his injury, could not reasonably know the cause or the identity of the prospective defendant, seem in accord with a rule often applied in medical malpractice cases: the statutory period starts to run when the plaintiff should reasonably know of his injury *and* the cause thereof.[43] But that rule has generally been rejected in other contexts; and in the defective product actions, *most* cases have held that the statute runs despite the plaintiff's ignorance of what or who caused his harm. Thus, in a leading California case in which the plaintiffs alleged that they did not learn until nearly sixteen

39. Grubb v. Albert Einstein Med. Ctr., 387 A.2d 480 (Pa. Super. 1978) (strict liability available against hospital as supplier of surgical instrument).

40. Ballew v. A.H. Robins Co., 688 F.2d 1325 (11th Cir. 1982) (applying Georgia law).

41. Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497 (Ky. 1979). *See* Nolan v. Johns-Manville Asbestos & Magnesia Materials Co., 74 Ill. App. 3d 778, 392 N.E.2d 1352 (1979), where there is language indicating the action accrued when plaintiff discovered he had contracted asbestosis and that this condition was due to acts or omissions of defendants, which would entitle him to proceed against them. *Cf.* Perez v. Universal Eng'g Corp., 413 So. 2d 75 (Fla. App. 1982) (negligence action against manufacturer of crusher machine, from which welders claimed to have contracted manganese poisoning, accrued when the welders were, by exercise of reasonable diligence, put on notice as to negligent act which caused the injury).

42. Williams v. Borden, Inc., 637 F.2d 731 (10th Cir. 1980) (applying Oklahoma law).

43. *See* Annot., 91 A.L.R.3d 991 (1979); Annot., 11 A.L.R.2d 277 (1950). *See generally* Annots., 1 A.L.R.4th 117 (1980); 80 A.L.R.2d 368 (1961).

months after their illness that it was peas canned by the defendant company that had produced their illness, the court held that the statute nonetheless ran from the time of the illness.[44] Ignorance that was not induced by fraud was ruled insufficient to prevent the running of the statute, despite the plaintiffs' assertions that they had made diligent efforts to determine the cause of their sickness. In a Florida case, a pilot injured in the crash of his helicopter stated that he did not have any reason to believe he had an action against the manufacturer of the helicopter until he received information from the Civil Aeronautics Board about another helicopter crash. The information led him to believe that his helicopter might have been defective.[45] However, the court held the statute ran from the time of the crash. An Illinois case held that since the plaintiff had known of her injury—a cerebral vascular accident—for more than the statutory period, she was barred from bringing a strict tort action against the manufacturer of a contraceptive which had allegedly caused this accident, even though it was not until two years after her stroke that she learned that the defendant's drug was the cause of her condition.[46] In a Texas case, lack of knowledge of the cause of the plaintiff's illness was held not to affect the running of the statute of limitations against the manufacturer of a contraceptive which was claimed to have produced a blood clot and resulting illness.[47]

Most courts clearly state that if the plaintiff knows he has suffered an injury or illness, there is ordinarily no reason to delay the running of the statute, even though it is not until later that the plaintiff learns of a legally responsible cause. If a bus driver falls when trying to adjust the bus's rear-view mirror and knows immediately of her injury from the fall, the statute starts to run at the time of the accident, not when the driver is later advised that a defect in the bus might have caused the fall.[48] If the owner of a building finds his roof is leaking, the statute runs from the time of discovery of the leak, not from the time the exact cause of the leak is determined.[49] In such cases, courts sometimes say that the plaintiff knew of his right to sue at the time of the injury, even if he did not learn until later of the possibly defective nature of the product,[50] or did not learn until later of the causal relationship between his injury and the allegedly defective product.[51] Not surprisingly, these courts also hold that the statute will run despite the plaintiff's ignorance as

44. Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1954).

45. Beasley v. Fairchild Hiller Corp., 401 F.2d 593 (5th Cir. 1968).

46. Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

47. Allen v. Ortho Pharmaceutical Corp., 387 F. Supp. 364 (S.D. Tex. 1974) (applying Texas law).

48. Lofton v. General Motors Corp., 694 F.2d 514 (7th Cir. 1982) (applying Illinois law).

49. Friends Univ. v. W.R. Grace & Co., 227 Kan. 559, 608 P.2d 936 (1980).

50. *See* Bates v. Little Co. of St. Mary Hosp., 108 Ill. App. 3d 137, 438 N.E.2d 1250 (1982).

51. *See* Burd v. New Jersey Tel. Co., 149 N.J. Super. 20, 372 A.2d 1355 (1977), *aff'd*, 76 N.J. 284, 386 A.2d 1310 (1978) (in negligence and strict liability action against manufacturer of pipe glue, toxic fumes from which had allegedly caused the plaintiff's heart attack, the plaintiff knew of some toxic effect of the fumes prior to the attack and thus should have known of possible causal link, and possible claim, when heart attack occurred).

to who actually manufactured or sold the product that caused the injury, as where a home water heater explodes and burns the plaintiff's house, and plaintiff does not determine until some time later the identity of the heater's manufacturer.[52] Such rulings obviously impose a heavy burden on plaintiffs to act not only with due diligence but with all possible (perhaps sometimes impossible) haste in learning the cause of their injuries and the responsible parties. It is certainly questionable whether the plaintiff really knows of his right to sue if he doesn't know whom to sue, or even that he has the basis for a lawsuit against anyone; yet this is *exactly* what some courts have ruled.[53]

There are, however, certain arguments that may sometimes aid a plaintiff who is trying to establish that his ignorance delayed the running of the statute. Sometimes there is an overlap between a lack of knowledge of injury (which, as has been shown, will often prevent the running of the statute) and lack of knowledge of the cause. Often, the plaintiff lacks knowledge of a product's defect or its harmful effects because the results of using the product are gradual. If use of the product is unaccompanied by sudden or perceptible trauma, recognition of the causal connection between the product and the injury is rendered nearly impossible. In such situations, the courts seem more sympathetic to the plaintiff's ignorance of the cause of injury, despite the plaintiff's having had some knowledge of the gradually developing injury itself. Thus, an Illinois case ruled that only when the plaintiff had discovered that his illness was the result of exposure to chemical compounds manufactured by the defendant did his action accrue, even though he had known of the illness for some time.[54] The court analogized this situation to the medical malpractice area, apparently finding the situation closer to those in which an illness is brought on by improper medical treatment than to those in which a defective product causes a sudden accident. This same attitude has been exhibited by other courts in dealing with the gradual development of high blood pressure,[55] or blindness,[56] or even eventual death.[57] In some of these cases, the courts have emphasized that despite the fact that medical authorities were promptly consulted, they could not for some time determine the possible causal link between the defendant's product and the plaintiff's harm.[58]

52. Pratt v. Sears Roebuck & Co., 71 Ill. App. 3d 825, 390 N.E.2d 471 (1979).

53. *See* Howe v. Pioneer Mfg. Co., 262 Cal. App. 2d 330, 68 Cal. Rptr. 617 (1968) (in suit by persons injured by inhaling gas escaping from defectively manufactured furnace, statute of limitations began to run when injury was suffered, even though plaintiffs were ignorant of cause of action or identity of wrongdoer).

54. Wigginton v. Reichold Chem., Inc., 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971). *Accord*, McDonald v. Reichold Chem., Inc., 133 Ill. App. 2d 780, 274 N.E.2d 121 (1971).

55. Gilbert v. Jones, 523 S.W.2d 211 (Tenn. App. 1974).

56. Raymond v. Eli Lilly & Co., 412 F. Supp. 1392 (D.N.H. 1976), *aff'd*, 556 F.2d 628 (1st Cir. 1977) (applying New Hampshire law).

57. Newcomer v. G.D. Searle & Co., 378 F. Supp. 1154 (E.D. Pa. 1974) (question of fact as to when the plaintiffs knew or should have known that defendant's drug could have been a factor in causing decedent's death; applying Pennsylvania law).

58. Raymond v. Eli Lilly & Co., 412 F. Supp. 1392 (D.N.H. 1976), *aff'd*, 556 F.2d 628 (1st Cir. 1977); Wigginton v. Reichold Chem. Co., 133 Ill. App.2d 776, 274 N.E.2d 118 (1971).

Other arguments can help the plaintiff who is unaware of the possible accrual of a cause of action. The plaintiff may contend that fraud or other wrongful conduct on the defendant's part has caused the alleged defect, its causal connection with the plaintiff's illness, or the identity of the defendant to remain concealed from the plaintiff. All courts are generally receptive to arguments for relief against the running of the statutory period where those arguments are based on the defendant's wrongful conduct. Thus, if the defendant has knowingly concealed information about its product that would have led the plaintiff to realize the possible link between that product and the plaintiff's harm, a court may find the defendant equitably estopped from asserting the statute of limitations.[59] If a manufacturer has, by its representations, lulled the plaintiff into a reasonable belief that the manufacturer's product is safe and has failed to give notice of harmful effects of which the manufacturer should reasonably have been aware, a court may simply rule that the statute did not start to run until plaintiff was aware of the cause of his harm.[60] Often the court will rule the statute tolled during the time of the fraudulent concealment. In a California case, the statute tolled where it was shown that defendant manufacturer of an airplane had known of defects in the plane's fuel system but had specifically represented to the Federal Aviation Administration that the fuel system was safe and had concealed the correct information about its condition.[61]

Sometimes there will be disputed issues of fact as to the existence of the fraud or concealment necessary to prevent running of the statute. Defendant's motions for dismissal will then be denied until these issues can be resolved by the trier of fact.[62] Thus, one early case involving a plaintiff who alleged he had contracted cancer as a result of smoking the defendant's tobacco products found disputed questions of fact regarding the defendant's failure to warn and its allegedly misleading advertisements.[63] It should be noted that an occasional court will strictly apply the rule that the statutory period runs from the moment of injury and will largely ignore contentions of fraud or concealment.[64]

59. *See* Perry v. A.H. Robins Co., 560 F. Supp. 834 (N.D.N.Y. 1983). *See generally* Annot., 24 A.L.R.2d 1413 (1952); Annot., 3 L.Ed. 2d 1886 (1959). *See also* Annot., 44 A.L.R.3d 760 (1972).

60. *See* Warrington v. Charles Pfizer & Co., 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969) (plaintiff and her physician relied on pharmaceutical company's express representation as to safety of its drug when company knew or should have known drug was unsafe and that its use by pregnant women involved serious risk). *See generally* Annot., 43 A.L.R.3d 429 (1972).

61. Baker v. Beech Aircraft Corp., 39 Cal. App. 3d 315, 114 Cal. Rptr. 171 (1974).

62. Hoeflich v. William S. Merrell Co., 288 F. Supp. 659 (E.D. Pa. 1968) (dispute over whether drug company had concealed information on possible side-effects; applying Pennsylvania law).

63. R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963) (applying Louisiana law).

64. *See* Walker v. Beech Aircraft Corp., 320 So. 2d 418 (Fla. App. 1975), *cert. dismissed*, 338 So. 2d 843 (1976), holding that plaintiff widow's lack of knowledge of the possible defective design of plane which crashed, killing her husband, did not affect running of statute of limitations on her action against airplane manufacturer).

Most courts are willing to modify the usual rules in situations of gradually developing disease or injury, or in situations of fraudulent conduct or intentional concealment on the part of defendants. Otherwise, however, the plaintiff is likely to face the often harsh rule that the statute runs from date of injury or reasonable time for discovery of injury, not from the date when the plaintiff learns of the cause of the harm. Even where the court is willing to bend the rule a bit and hold that the statute does not run until the plaintiff could reasonably have learned the cause of his injury and the person responsible, the court is almost certain to put the burden on the plaintiff of establishing this excuse for delay.[65] Plaintiffs may also have to contend with the often inflexible judicial posture of very strict construction of survival and wrongful death statutes.[66] Finally, a few courts may hold a plaintiff to an even stricter standard than the usual one of having to file within the prescribed time from date of injury. They may rule that the cause of action accrued earlier if the plaintiff knew or should have known of the alleged defect at a prior date.[67] Unpredictability of result in this area is also increased by the nonexistence in some jurisdictions of any statute clearly applicable to products liability actions. Courts may thus end up applying a catch-all provision covering "civil actions not otherwise mentioned," or similar language.[68]

Statute of Limitations in Warranty

The general rule of limitations as to products cases brought under a strict tort theory, or a negligence theory, is clear: The relevant tort statute applies, and it ordinarily starts to run at the date of injury. Those jurisdictions that once held to the contrary and applied the contract statute, running from the date of sale,[69] have overruled that authority and adopted the majority view.[70] But the plaintiff has an additional option on which to base a product liability claim: breach of warranty, express or implied. If he uses this theory, what statute of limitations will apply?

The Uniform Commercial Code, in effect in all states but Louisiana, provides that an action must be brought within four years from the time of

65. *See* McDaniel v. Johns-Manville Sales Corp., 542 F. Supp. 716 (N.D. Ill. 1982) (asbestos-related diseases allegedly caused by occupational exposure to asbestos products supplied by defendant; applying Illinois law).

66. *See* McDaniel v. Johns-Manville Sales Corp., 511 F. Supp. 1241 (N.D. Ill. 1981) ("discovery" rule inapplicable to survival act claims under Illinois law). *But see* Eisenmann v. Cantor Bros., Inc., 567 F. Supp. 1347 (N.D. Ill. 1983), reaching a contrary result under Illinois law.

67. *See* Maly v. Magnavox Co., 460 F. Supp. 47 (N.D. Miss. 1978) (strict liability and negligence claims against manufacturer of television set that caught fire and damaged plaintiff's house accrued when fire occurred, unless it was shown that buyer knew or should have known of alleged defect earlier; applying Mississippi law).

68. Romano v. Westinghouse Elec. Co., 114 R.I. 451, 336 A.2d 555 (1975) (civil actions not "otherwise specifically provided" for).

69. Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969); Jackson v. General Motors Corp., 223 Tenn. 12, 441 S.W.2d 482 (1969).

70. Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975); McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487 (Tenn. 1975).

accrual,[71] and that accrual takes place when the breach occurs.[72] Some jurisdictions in enacting the Code have provided a different period of limitation, such as five or six years rather than four;[73] and many states have other statutes on breach-of-contract actions that arguably could apply to products cases; however, the date of accrual remains the same. The date of breach, and thus of accrual, has been held to mean the date when the defective product was delivered.[74] This rule has been applied despite the fact that it creates a different time of accrual from that applicable to a tort claim, although the tort claim may be asserted in the same action based upon the same occurrence.[75] The "date of delivery" has in turn been interpreted as meaning the date of sale to the owner—the person in ownership, possession, or control at the time the product causes harm.[76] Thus, it is usually said that "date of sale," not "date of injury," governs.[77]

However, both the Code and pertinent case law have recognized certain qualifications to this general rule. The Code provides that if a warranty expressly extends to the future performance of a product, a cause of action does not accrue until a breach of warranty is or should reasonably have been discovered.[78] For example, in a case involving a burial vault,[79] the defendant manufacturer stated that the vault would "give satisfactory service at all times." Because the warranty extended to future performance, the court held that when plaintiff exhumed the body of her husband for transfer to another cemetery and found that a leak in the casket had caused damage to the casket and the body, the cause of action accrued at the time she discovered the defect. Distinguishing warranties of future performance from other warranties can be very difficult. One court found a warranty of future performance in a seller's statement that a heating system would work well in subzero temperatures, since discovery of any breach could not occur until the arrival

71. U.C.C. § 2-725(1) (1978).

72. U.C.C. § 2-725(2) (1978). Section 2-725 has been held to supersede the general statute of limitations on contract actions when a sale of goods is involved. Sesow v. Swearingin, 552 P.2d 705, 706-07 (Okla. 1976). *See* Cochran v. Buddy Spencer Mobile Homes, Inc., 618 P.2d 947, 950 (Okla. Ct. App. 1980).

73. For example, Oklahoma allows five years. 12A OKLA. STAT. § 2-725(1) (1981). *See generally* Annot., 91 A.L.R.3d 455, 465 (1979).

74. *See* Johnson v. Hockessin Tractor, Inc., 420 A.2d 154 (Del. 1980).

75. *See* Amermac, Inc. v. Gordon, 182 Ind. App. 116, 394 N.E.2d 946 (1979); Lewis v. John Royle & Sons, 70 Misc. 2d 304, 357 N.Y.S.2d 601 (Sup. Ct. 1974), *aff'd*, 46 A.D.2d 304, 362 N.Y.S.2d 262 (N.Y. App. Div. 1974) (lower court refers to "strict tort liability" as accruing from time of sale and "strict products liability," founded on a tortious wrong, as accruing at time of injury; but such terminology is generally rejected in favor of contrasting "breach of warranty" with "strict tort liability").

76. *See* McKee v. Johns-Manville Corp., 94 Misc. 2d 327, 404 N.Y.S.2d 814 (Sup. Ct. 1978) (when defendants last sold product).

77. Nelson v. Volkswagen of America, Inc., 315 F. Supp. 1120 (D.N.H. 1970) (applying New Hampshire law).

78. U.C.C. § 2-725(2) (1978).

79. Mittasch v. Seal Lock Burial Vault, Inc., 42 A.D.2d 573, 344 N.Y.S.2d 101 (N.Y. App. Div. 1973).

of cold weather.[80] Another case, however, held that a statement that a welder could perform a specified number of welds per minute was only a warranty of present, not future, performance, despite the inability to discover the untruth of the assertion until the welder was used.[81] Similarly, establishing that the manufacturer had a continuing duty to warn can delay the accrual of the cause of action. It has been held that the statute of limitations does not then run so long as the duty exists.[82]

With these possible qualifications, the "date of delivery" rule has been applied even where the suit is against a remote defendant, i.e., where the ultimate purchaser or someone injured during his ownership sues the manufacturer. Nonetheless, the date of delivery to the purchaser controls, not the date when the product left the hands of the manufacturer.[83] Furthermore, the Code statute of limitations has often been applied even though the harm suffered involved personal injury or other traditionally "tort" type damage, such as that suffered due to escape of gas from a conduit.[84] In such situations, the plaintiff may waive the tort and sue instead on the breach of warranty.[85] But, of course, plaintiff may actually assert both theories. Even if the statute is found to have run on the tort count, he may still prevail on the warranty claim.[86]

Warranty liability obviously involves obligations different from negligence liability. While warranty liability is based on express or implied assertions of the suitability of the goods for certain purposes, negligence liability is premised on the duty of individuals to use due care.[87] This "warranty option," then, would possibly allow the plaintiff to take advantage of a longer statute, since the Code period is always at least four years. But the plaintiff must keep in mind that the Code statute runs from time of delivery, except for the above mentioned qualifications.[88] Neither injury nor discovery of injury is necessary to start the statute running.[89] A little authority to the contrary exists. In a case involving alleged breach of warranty for transfusion of in-

80. Perry v. Augustine, 37 Pa. D. & C.2d 416 (1965).

81. Binkley Co. v. Teledyne Mid-Am. Corp., 460 F.2d 276 (8th Cir. 1972) (applying Missouri law). See the discussion of these same "future performance" cases in D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 135 (2d ed. 1981).

82. *See* Boains v. Lasar Mfg. Co., 330 F. Supp. 1134 (D. Conn. 1971).

83. *See* Wilson v. White Motor Corp., 118 Ill. App. 2d 436, 254 N.E.2d 277 (1969); Bates v. Shapard, 224 Tenn. 672, 461 S.W.2d 946 (1970).

84. As in Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964).

85. Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933). *See generally* Annot., 37 A.L.R.2d 703 (1954).

86. *See* Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936). Of course, in these early cases the Uniform Commercial Code did not exist, and the courts applied the relevant contract statute.

87. Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953), *rejecting* Buyers v. Buffalo Paint & Spec., 199 Misc. 764, 99 N.Y.S.2d 713 (Sup. Ct. 1950); Schlick v. New York Dugan Bros., Inc., 175 Misc. 182, 22 N.Y.S.2d 238 (N.Y. City Ct. 1940).

88. See *supra* notes 78-82 and accompanying text.

89. *See* Simmons v. Clemco Indus., 368 So. 2d 509 (Ala. 1979).

fected blood, the court held that the statute did not run until the breach (i.e., the defect) was or should reasonably have been discovered.[90]

Giving the plaintiff the option of using the Code statute, even where plaintiff's injuries are "tortious" in nature, has been controversial because the applicable statute depends on which theory of recovery is used; thus, actions involving exactly the same injury are often treated quite differently. Some courts have come increasingly to the view that the type of harm suffered should control the applicable statute of limitations, not whether the caption on the complaint reads "breach of warranty" or "strict tort." Contrary to the above-cited cases,[91] some authority now holds that, at least where recovery is sought for personal injuries, the tort statute should govern, even if the action is stated as involving a breach of warranty.[92] These cases have emphasized the basically tortious nature of the claim.[93] Under this reasoning, use of the warranty statute can be denied even where plaintiff was in privity of contract with defendant, thus arguably bringing the Code fully into operation.[94]

All the cases denying application of the Code or the contract statute of limitations have one common theme: The form of pleading used is immaterial and the alleged injury should be determinative of the applicable statute. Thus, a federal case from California in which the plaintiff had become ill after discovering a dead mouse in a bottle of the defendant's beer held that the statute of limitations for injuries caused by a negligent or wrongful act applied, despite the plaintiff's attempt to base her action on breach of an implied warranty of fitness.[95] The court reasoned that the contract merely gave rise to the duty allegedly breached by the defendant, while the gravamen of the com-

90. Lewis v. Associated Med. Inst., Inc., 345 So. 2d 852 (Fla. App. 1977), *cert. denied*, 353 So. 2d 676. *Cf.* Reiterman v. Westinghouse, Inc., 106 Mich. App. 698, 308 N.W.2d 612 (1981) (breach of warranty action against manufacturer of electric clothes dryer accrued when dryer caused fatal electric shock as this indicated product may have been defective).

91. See *supra* notes 74-77, 83-87 & 89 and accompanying text.

92. *See* Annot., 37 A.L.R.2d 703 (1954).

93. *See* Wetzel v. Commercial Chain Co., 18 Ariz. App. 54, 500 P.2d 314 (1972); Citizens Cas. Co. v. Aeroquip Corp., 10 Mich. App. 244, 159 N.W.2d 223 (1968). *Cf.* Morris v. Wise, 293 P.2d 547 (Okla. 1955) (action growing out of automobile accident must be brought within two years of accident; denial by each of two occupants of car that he was driving is insufficient to keep statute from running); Waugh v. Guthrie Gas, Light, Fuel & Improvement Co., 37 Okla. 239, 131 P. 174 (1913) (mere failure to disclose that cause of action exists does not prevent running of statute). *But cf.* Hepp Bros. Inc. v. Evans, 420 P.2d 477 (Okla. 1966) (breach of warranty action did not accrue until discovery of defect).

94. *See* Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973) (truck driver who had purchased defective tire could not use Code statute of limitations in action for personal injuries against either retailer or manufacturer; Code applies only to nonpersonal injury claims).

95. Zellmer v. Acme Brewing Co., 184 F.2d 940 (9th Cir. 1950). *See* Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1954) (action for harm suffered from eating unfit peas canned by defendant had to be brought within period for personal injury actions, not within period for implied warranty actions). *Cf.* Patterson v. Vincent, 44 Del. 442, 61 A.2d 416 (Super. Ct. 1948) (action for injurious result of use of medicine came within statute of limitations for personal injuries regardless of whether particular claim was based on breach of contract or on negligence).

plaint was the personal injuries suffered. Similarly, in an Illinois lawsuit against a restaurant that was alleged to have served harmful food, the plaintiff claimed that the restaurant had breached its warranty that the food was fit for human consumption.[96] Therefore, the plaintiff contended that the statutory period for actions based on unwritten contracts should apply, especially since he was seeking to recover lost earnings and medical expenses. The court refused to follow this reasoning, however, and ruled that because all the alleged damages arose out of a personal injury, the statutory period on personal injury claims should govern. A court applying Kentucky law has stated that whether an action sounds in contract or in tort or grows out of violation of a statute should be irrelevant in determining the proper statute of limitations. So long as the harm for which recovery is sought is physical injury to a person, the statutory period on personal injury claims should control.[97]

Many of the modern cases, in deciding whether to apply contract, rather than tort, period of limitation, weigh the desirability of "symmetry," i.e., of having the same statute of limitations apply to certain types of harm regardless of whether the action is brought under a tort or a warranty theory. However, the recognition of the need for, or the desirability of, such symmetry is hardly universal. Pennsylvania is a good example of a jurisdiction in which the court has struggled with this question. Pre-Code Pennsylvania cases exhibited a tendency to look to the nature of the injury alleged in determining the relevant statutory period and to deny application of the contract statute when personal injury was the basis of the claim.[98] This approach was altered in a 1962 case brought by a plaintiff allegedly injured by a defect in his washing machine. Because the claim was asserted under the Uniform Commercial Code, a Pennsylvania court held that the period specified in section 2-725 of the Code applied.[99] Several years later, the Pennsylvania Supreme Court reached the same result in a case in which the plaintiffs alleged a breach of warranty by a gas company resulting in personal injury.[100] The court here relied on the section of the Code that states that all legislation inconsistent with the Code was repealed by adoption of that law and found that this had repealed the tort statute of limitations insofar as it applied to actions covered by the Code.[101] But recently, in an action involving an employee who claimed to have been injured by a defective boiler purchased by his employer, the

96. Seymour v. Union News Co., 349 Ill. App. 197, 110 N.E.2d 475 (1953).

97. Finck v. Albers Super Mkts., Inc., 136 F.2d 191 (6th Cir. 1943) (applying Kentucky law).

98. *See* Jones v. Boggs & Buhl, Inc., 355 Pa. 242, 49 A.2d 379 (1946); Bradley v. Laubach, 23 Pa. D. 151 (1914). *But see* McGrath v. Helena Rubinstein, Inc., 29 F. Supp. 822 (S.D.N.Y. 1939), applying Pennsylvania law and finding an action for breach of warranty not within that state's statute of limitations on actions for personal injuries.

99. Engleman v. Eastern Light Co., 30 Pa. D. & C.2d 38 (1962).

100. Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964). *See* Natale v. Upjohn Co., 356 F.2d 590 (3d Cir. 1966); Patterson v. Her Majesty Indus., Inc., 450 F. Supp. 425 (E.D. Pa. 1978); Hoffman v. A.B. Chance Co., 339 F. Supp. 1385 (M.D. Pa. 1972); Hoeflich v. William S. Merrell Co., 288 F. Supp. 659 (E.D. Pa. 1968).

101. U.C.C. § 10-103 (1962).

Pennsylvania court shifted gears. The court reenlisted the assistance of the symmetry principle and ruled that the tort statute of limitations should apply even though the suit alleged a breach of warranty.[102]

Note, however, that this reaffirmation of symmetry was in a case in which no privity existed between the plaintiff and the defendant since the plaintiff had not purchased the product. In another recent case, a Pennsylvania court upheld application of the Code period of limitation where the plaintiff was suing his immediate seller.[103] On review of that case, the Pennsylvania Supreme Court appeared to do a complete reversal: In again upholding application of the Code to a suit by a buyer against his immediate seller, the court stated in dictum that even a plaintiff suing a remote defendant with whom he had no privity could use the Code's limitation period if he based his claim on breach of warranty.[104]

Similarly, despite indications in Kentucky that the nature of the injury, rather than the form of the action should determine the applicable statute,[105] a recent federal case held that a personal injury action alleging breach of warranty is governed by the Code.[106] Texas has specifically rejected the need for legal symmetry regarding the statute of limitations applied to defective product claims involving personal injury.[107] Authorities rejecting symmetry sometimes note that the Code's application is not limited to cases dealing with commercial losses and that the option of using the Code and its limitation period should thus be available to those incurring personal injuries.[108]

In other cases, however, the symmetry argument has prevailed. A New Jersey opinion dealt with a suit against both the retail dealer and the manufacturer of a truck whose defects were alleged to have caused the plaintiff's personal injuries.[109] Despite the plaintiff's privity with one of the parties sued, the court refused to apply the Code's period of limitation, stating that although the case might have arisen from the consequences of a sale, it was essentially a personal injury action that could not be changed by the plaintiff's labeling it "breach of contract." Few authorities have, however, yet been willing to go that far and often the victory of symmetry is only partial. For example, in a Rhode Island case plaintiffs sued a party with whom they lacked privity and argued for application of the four-year Code statute. The court looked to the gist of the complaint rather than its caption and applied the tort

102. Salvador v. Atlantic Steel Boiler Co., 256 Pa. Super. 330, 389 A.2d 1148 (1978), *aff'd per curiam*, 492 Pa. 258, 424 A.2d 497 (1981). *Accord*, Hahn v. Atlantic Richfield Co., 625 F.2d 1095 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981).

103. Williams v. West Penn Power Co., 313 Pa. Super. 461, 460 A.2d 278 (1983).

104. Williams v. West Penn Power Co., 502 Pa. 557, 467 A.2d 811 (1983).

105. *See* Finck v. Albers Super Mkts., Inc., 136 F.2d 191 (6th Cir. 1943).

106. Teel v. American Steel Foundries, 529 F. Supp. 337 (E.D. Mo. 1981) (applying Kentucky law).

107. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456 (Tex. 1980).

108. *See* Burch, *A Practitioner's Guide to the Statute of Limitations in Products Liability Suits*, 5 BALTIMORE L. REV. 23, 27-28 (1975); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 995 (1966).

109. Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973).

statute.[110] However, in a later case in which the plaintiffs sued the dealer from whom they had bought an automobile with allegedly defective tires, and also sued the automobile and tire manufacturers, the court found the action governed by the tort statute as to the manufacturers, but found the Code period of limitation applicable as to the dealer.[111] This may be considered a compromise position, but it makes the applicable statute of limitations depend on the theory used, not the type of harm that has occurred, and may result in different treatment of two claims for the same kind of harm. It leaves the plaintiff who had no contractual dealings with his defendant unable to use the potentially longer Code statute,[112] but would allow this option to a plaintiff who can show privity with the defendant.

This middle position—neither totally rejecting the Code where personal injury is involved nor allowing the Code to be used in all cases of allegedly defective products—has been adopted by Oklahoma. In the 1974 case of *Moss v. Polyco, Inc.*,[113] the court dealt with a case in which plaintiff was injured in a restaurant when a can of drain cleaner fell from a shelf in the restaurant's restroom and its contents spilled on her. Plaintiff sued the manufacturers and suppliers of the cleaner twenty-eight months after the injury occurred. Thus, the action was not brought within the two-year statutory period for tort claims. Clearly, no privity existed between the plaintiff and the defendants. Noting that the Code "has to do with commercial transactions,"[114] and applies where the buyer is in privity with a seller, the court ruled that the two-year tort statute applied, rather than the five-year period provided by Oklahoma's version of the Code. The court pointed out that section 2-318 of the Code specifically extends warranty protection to designated third-party beneficiaries—any natural person in the family or household of the buyer and any guest in his home. The plaintiff, however, did not come within this coverage.[115] The court observed that while the Code "parallels the doctrine of strict liability in tort,"[116] the two theories are separate and should not be confused. Also rejected was the contention that the statutory period for contracts not in writing should be applied. The court simply noted that the action did not arise upon contract but was based on an alleged tort.

The *Moss* holding was reiterated by the Oklahoma Supreme Court in another case decided the same day in which plaintiff sued the manufacturer of a pro-

110. Kelly v. Ford Motor Co., 110 R.I. 83, 290 A.2d 607 (1972).

111. Plouffe v. Goodyear Tire & Rubber Co., 118 R.I. 288, 373 A.2d 492 (1977) (but no breach of warranty found, since proof was lacking that defect existed in tires at time of delivery).

112. *See* Citizens Cas. Co. v. Aeroquip. Corp., 10 Mich. App. 244, 159 N.W.2d 223 (1968).

113. 522 P.2d 622 (Okla. 1974).

114. *Id.* at 625.

115. *Id.*, citing in support Klimas v. International Tel. & Tel. Corp., 297 F. Supp. 937 (D.R.I. 1969).

116. Moss v. Polyco, Inc., 522 P2d 622, 626 (Okla. 1974). In support of its statement that the Uniform Commercial Code and the doctrine of strict liability in tort are parallel but should not be confused with one another, the court cited Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973); Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970).

duct.[117] The court stated that because Oklahoma had adopted strict tort liability for defective products,[118] the only possible implied warranty recovery would be under the Code. Since the plaintiff had not alleged facts that would bring the Code into operation,[119] the tort statute of limitations would necessarily apply. A federal case applying Oklahoma law subsequently applied the same rule, concluding that under Oklahoma law even a plaintiff who comes within Code section 2-318 cannot use the Code and its statute of limitations against a party such as a manufacturer with whom plaintiff had no privity.[120]

A later Oklahoma case specifically denied the use of the Code and its statute of limitations to an employee of the purchaser, since employees are not among the listed prospective plaintiffs in section 2-318.[121] The court clearly stated that both negligence and strict tort actions for defective products are governed by the two-year tort period. But what if plaintiff *is* within section 2-318 and *does* have privity with defendant? In accord with the dicta in the above-cited cases, in 1980 the court of appeals held that such a plaintiff has the alternative of using the warranty theory and can then take advantage of the Code statute of limitations.[122] The plaintiff must simply plead facts that bring article 2 of the Code into operation. Such pleading must, of course, establish a "sale" from defendant to plaintiff,[123] and the Code has thus been held in-

117. O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614 (Okla. 1974). *Cf.* Walker v. Armco Steel Corp., 446 U.S. 740, 742 n.3 (1980), saying that under Oklahoma law, a products liability suit is governed by the two-year tort statute whether brought on a negligence or a warranty basis. This case involved a plaintiff (a worker injured by an allegedly defective nail) not in privity with defendant (manufacturer of the nail). Therefore, the Uniform Commercial Code did not apply.

118. Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974), decided the same day as *Moss* and *O'Neal*. *See* McNichols, *supra* note 2. The *Kirkland* case and other early Oklahoma authority applying strict tort liability referred to the doctrine as "manufacturers' products liability," but this was clearly the same as what is usually designated "strict liability in tort."

119. O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614, 615 (Okla. 1974). Section 2-725 of the Code was said to have "Code application only." *Id.* at 616. The court never specifically states *why* the Code could not come into operation in this case, but it seems clearly due to the lack of privity, i.e., defendant was the manufacturer rather than a party with whom the plaintiff had dealt. The court also rejected application of the Oklahoma statute on contract claims, 12 OKLA. STAT. § 95(2) (1981), since the only possible bases of recovery other than the Code were negligence and strict tort liability, both of which come within the tort statute of limitations, 12 OKLA. STAT. § 95(3) (1981). *Id.* at 615.

120. Nichols v. Eli Lilly & Co., 501 F.2d 392 (10th Cir. 1974) (buyer injured by using allegedly defective birth control pills barred by the two-year tort statute of limitations in action against the manufacturer).

121. Hester v. Purex Corp., 534 P.2d 1306 (Okla. 1975) (allegedly defective cleaning product manufactured by defendant and sold to plaintiff's employer).

122. Cochran v. Buddy Spencer Mobile Homes, Inc., 618 P.2d 947 (Okla. Ct. App. 1980) (action by mobile home buyer against retail seller, alleging breach of implied warranty arising from contract for sale of home). The court held that the Uniform Commercial Code statute of limitations, providing a period of five years from the time of sale, superseded the general Oklahoma statute of limitations on contracts—in this case, the three-year period for an implied contract not in writing. *Id.* at 950. Thus, Oklahoma will allow use of the Code statute of limitations if: (1) plaintiff is a buyer or a party otherwise coming within section 2-318 of the Code, *and* (2) plaintiff or his buyer is in privity with defendant.

123. U.C.C. § 2-313 (1977) (express warranty); U.C.C. § 2-314 (1977) (implied warranty of fitness for particular purpose); U.C.C. § 2-315 (1977) (implied warranty of merchantability).

applicable in a patient's suit against a hospital because this is interpreted as a "service" transaction.[124]

Expansion and Contraction of the Warranty Remedy

The restriction on the use of warranty theory to those who are in privity with their defendant is a relatively recent development and runs counter to earlier Oklahoma cases decided prior to the adoption of strict tort liability.[125] In 1945, Oklahoma held that manufacturers who prepare food or beverage and place it in sealed containers with the intention that the container not be opened until the time of consumption impliedly warrant the fitness of the contents and can be sued for breach of such warranty by a consumer who is not in privity.[126] In 1964 the Oklahoma court applied this same extension of warranty liability to products manufactured for use on the human body.[127] And in 1967, the court largely abrogated the privity requirement when it allowed an implied warranty action against a manufacturer by a retail purchaser of a battery, despite the plaintiff's lack of direct contractual dealing with the manufacturer.[128] The court recognized public policy as requiring recognition of implied warranties extending to the ultimate consumer, and the court's reasoning edged close to adoption of strict liability in tort.[129]

In 1967 a federal case applied the implied warranty sections of the Code in favor of a plaintiff who was an employee of the purchaser, injured when

124. Redwine v. Baptist Gen'l Convention, 681 P.2d 1121 (Okla. Ct. App. 1982) (hospital's charging patient for use of medical equipment not a "sale" within Code sections on implied warranties of fitness and merchantability; thus five-year Code statute of limitations did not apply).

125. *See* Note, *Torts: A Primer on Strict Liability in Tort in Oklahoma*, 23 OKLA. L. REV. 304 (1970). *See generally* Note, *Torts— Products Liability—Oklahoma's Emergence from Antiquity, Acceptance of the Doctrine of Strict Liability in Tort*, 6 TULSA L.J. 61 (1969).

126. *See* Griffin v. Asbury, 196 Okla. 484, 165 P.2d 822 (1945). *See also* Jackson v. Cushing Coca-Cola Bottling Co., 445 P.2d 797 (Okla. 1968); Sneed v. Beaverson, 395 P.2d 414 (Okla. 1964); Cook v. Safeway Stores, Inc., 330 P.2d 375 (Okla. 1958), all also allowing recovery for breach of implied warranty, in food-and-drink situations, against a defendant with whom there was no privity. *Cf.* Oklahoma Coca-Cola Bottling Co. v. Newton, 205 Okla. 360, 237 P.2d 627 (1951); Southwest Ice & Dairy Prod. Co. v. Faulkenberry, 203 Okla. 279, 220 P.2d 257 (1950), both having language indicating that implied warranty liability could exist for defective food or drink regardless of privity; however, both used negligence terminology. Oklahoma, like most states, long ago abandoned any requirement of privity in negligence cases involving injury-causing products. *See* Bower v. Corbell, 408 P.2d 307 (Okla. 1965); Gosnell v. Zink, 325 P.2d 965 (Okla. 1958); Crane Co. v. Sears, 168 Okla. 603, 35 P.2d 916 (1934).

127. John A. Brown Co. v. Shelton, 391 P.2d 259 (Okla. 1964) (hair spray).

128. Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965), noted 20 OKLA. L. REV. 326 (1967).

129. The court quoted the leading strict liability in tort case, Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), for the propositions that (1) strict liability should be extended to nonfood products; (2) the manufacturer should not be able to limit the scope of liability via contract because the liability is imposed by law; (3) no privity of contract is now required for strict liability, and other rules governing warranties do not necessarily apply; and (4) the purpose of the strict liability is to ensure that the costs of injuries caused by defective products are borne by those who put these products on the market. *Accord*, Marathon Battery Co. v. Kilpatrick, 418 P.2d 900, 914-15 (Okla. 1965).

the allegedly defective product was being used by a coworker.[130] The court found privity unnecessary but also described the employee as standing in the shoes of the employer buyer. This extension of implied warranty was specifically rejected by the Oklahoma court in the *Moss* case, which stated that an injured employee under such circumstances has a possible action under strict tort liability but not under the Code.[131] The court has subsequently specifically held that the implied warranty provisions of the Code do not extend to employees of the purchaser.[132] Of course, between the time of the 1967 federal case and the decision in *Moss*, Oklahoma adopted the theory of strict tort liability for defective products. The court now seems to say to plaintiffs, "We've given you this great new remedy of strict tort liability; you'll have to use that now and forget about implied warranty unless you have privity with your defendant and come strictly within the terms of the Code." This is quite an about-face from the attitude in the late sixties of extending warranty recovery to all foreseeable plaintiffs.

In the 1960s, the same expansion of warranty was occurring in many jurisdictions. The privity requirement was first abolished as to food products,[133] and by the late sixties had been abolished as to all products in practically every jurisdiction.[134] During those same years, all jurisdictions except Louisiana adopted the Uniform Commercial Code.[135] The Code abolishes the need for privity as to certain potential users of a product (what is sometimes termed "horizontal privity") under Alternative A, the most commonly adopted version, of section 2-318.[136] There are two alternative versions of section 2-318,

130. Speed Fastners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967).

131. Moss v. Polyco, Inc., 522 P.2d 622, 627 (Okla. 1974).

132. Hester v. Purex Corp., 534 P.2d 1306 (Okla. 1975). *Cf.* Hardesty v. Andro Corp.,-Webster Div., 555 P.2d 1030 (Okla. 1976) (manufacturer sold air-conditioner chiller unit to subcontractor, to be used in fulfilling contract with apartment owner; warranty held not to extend to owner as warranties do not extend to those without privity except as statutorily provided).

133. *See, e.g.*, Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E.105 (1931); Mazetti v. Armour & Co., 78 Wash. 622, 135 P. 633 (1913). *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1104-14 (1960), stating that by that time, twenty-two states had definitely abandoned the requirement of privity in food cases.

134. *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966), concluding that privity was dead. By this time, Prosser found that twenty-four jurisdictions clearly did not require privity as to manufacturers of all types of products, six more probably did not, eight did not as to certain types of products, and one did not where certain types of plaintiffs were involved. *Id.* at 794-99.

135. *See* Miller, *The Crossroads: The Case for the Code in Products Liability*, 21 OKLA. L. REV. 411, 413 (1968).

136. U.C.C. § 2-318 (1977). Alternative A of § 2-318 provides,

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

See Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc., 604 P.2d 849 (Okla. 1979), holding that section 2-318 comes into play only after a final sale is made and then limits application

both of which extend the group of potential plaintiffs still farther.[137] The Code is silent as to so-called "vertical privity": the requirement of privity to defendants on up the line, such as manufacturers. However, vertical privity was also being eliminated by judicial action during this period. For example, in 1959 a Pennsylvania court allowed an injured customer to sue the manufacturer on implied warranty despite the lack of direct contractual relationship.[138] If there was a problem with privity during these years, it was due to the reluctance of some courts to extend "horizontal privity"—the users and affected persons who could sue—beyond those specified in section 2-318 of the Code. Thus, Pennsylvania in 1963 refused to extend warranty recovery in this direction and denied an action to an employee of a purchasing organization.[139] But this result was persuasively criticized,[140] and eventually the Pennsylvania court made it clear that all privity requirements in warranty were abolished.[141]

As in Oklahoma, the privity requirement has had renewed life in warranty cases of recent years in other states, following adoption of strict tort recovery. Thus, in 1980 an Indiana court declared that while privity had been eliminated in tort law, it remains an element of breach of warranty actions.[142] Idaho and Wisconsin have adopted strict tort liability,[143] but have required privity

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of warranties as to nonpurchasers; it has no application to a purchaser in the vertical chain of distribution.

137. U.C.C. § 2-318 (1977). Alternative B states: "A seller's warranty whether express or implied extends to any natural person who may be reasonably expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Kansas has adopted this version. KAN. STAT. ANN. § 84-2-318 (1983).

Alternative C states:

> A seller's warranty whether express or implied extends to any person who may be reasonably expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of the individual to whom the warranty extends.

Hawaii has adopted this version. HAWAII REV. STAT. § 490:2-318 (1976).

Comment 3 to section 2-318 notes that beyond the extent that the need for privity (so-called "horizontal privity") is abolished by this section, "the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties . . . extend to others in the distributive chain."

138. Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959). *See* Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962) (privity of contract not required in Pennsylvania, at least in suits by purchasers of new automobiles against manufacturers). *See generally* Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQ. L. REV. 1 (1963).

139. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).

140. *See* Murray, *Products Liability—Another Word*, 35 U. PITT. L. REV. 255, 257-62 (1973); Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391 (1972).

141. Salvador v. Atlantic Boiler Co., 457 Pa. 24, 319 A.2d 903 (1974). Pennsylvania did not, however, adopt this position until strict tort liability had been developed as an additional theory of recovery.

142. Lane v. Barringer, 407 N.E.2d 1173 (Ind. Ct. App. 1980).

143. *See* Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

in warranty actions.[144] Nevada also seems to take this position, at least as to horizontal privity.[145] These decisions again mean that the applicable law—whether or not privity is required, and thus also often whether a particular prospective plaintiff can use the Code's statute of limitations—depends on the theory used in the action. But again, as to the need for privity as well as the choice of statute of limitations, some authorities have found symmetry desirable: similarity of applicable law and of result regardless of the legal theory used. For example, Ohio put an end to the need for privity in warranty actions in 1966[146] and has stayed with that conclusion.[147] Lower-court authority indicates the same is true in New York[148] and New Jersey,[149] and this result has been adopted by statute in Tennessee.[150]

One might expect that those jurisdictions not requiring privity for the breach of warranty action would always apply the tort statute of limitations; however, such consistency is not readily apparent. Despite Kentucky's abrogation of privity,[151] a federal court has held that under Kentucky law an action for personal injuries brought under warranty is governed by the Code statute of limitations.[152] Texas courts have specifically held that while privity is not required in warranty actions, the statute of limitations found in section 2-725 applies to all breach of warranty actions.[153] Oklahoma decisions exhibit no

144. Robinson v. Williamson Idaho Equip. Co., 94 Idaho 819, 498 P.2d 1292 (1972); Austin v. Ford Motor Co., 86 Wis. 2d 628, 273 N.W.2d 233 (1979). *See* Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974).

145. *See* Amundsen v. Ohio Brass Co., 89 Nev. 378, 513 P.2d 1234 (1973) (requiring horizontal privity in a warranty case; subsequently, the Nevada court did abolish vertical privity); Hiles Co. v. Johnston Pump Co., 93 Nev. 73, 560 P.2d 154 (1977) (distinguishing but not overruling the *Amundsen* case, *supra*, and thus leaving the horizontal privity requirement intact). *See* Zaika v. Del E. Webb Corp., 508 F. Supp. 1005 (D. Nev. 1981) (applying Nevada law). Nevada had adopted strict tort liability in Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970).

146. Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966) (implied warranty). The privity requirement as to express warranty had been abolished even earlier; Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

147. *See* Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

148. *See* Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 354 N.Y.S.2d 778 (Sup. Ct. 1974), *rev'd*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975); Ciampichini v. Ring Bros., Inc., 40 A.D.2d 289, 339 N.Y.S.2d 716 (1973).

149. *See* Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971).

150. TENN. CODE ANN. § 29-34-104 (1980), providing that privity is not a requirement in any negligence, strict liability, or breach of warranty actions for personal injury or property damage. This legislatively overturned the decision in Hargrove v. Newsome, 225 Tenn. 462, 470 S.W.2d 348 (1971). The Tennessee statute was adopted after that decision. 1972 Tenn. Pub. Acts, ch. 670, § 1. Maine now has a similar statute, achieved through amendment of U.C.C. § 2-318 (1977). ME. REV. STAT. ANN. tit. 11, § 2-318 (Supp. 1984). And Maine has also codified the doctrine of strict tort liability as set forth in RESTATMENT (SECOND) OF TORTS § 402A (1965); ME. REV. STAT. ANN. tit. 14 § 221 (1980).

151. Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965).

152. Teel v. American Steel Foundries, 529 F. Supp. 337 (E.D. Mo. 1981) (applying Kentucky statute of limitations; finding substantial doubt as to which statute of limitations Kentucky would apply and therefore applying the longer period).

153. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456 (Tex. 1980). Among cases in other jurisdictions applying the Code statute of limitations to warranty actions, though not requiring

such inconsistency: While Oklahoma courts do not require privity of contract and do apply the tort statute of limitations in strict tort actions, they also require privity *and* apply the Code period of limitation in warranty actions.[154]

The only question is whether this is the better approach, as opposed to that taken by other jurisdictions. For instance, a New Jersey court abolished the need for privity in both strict tort and warranty actions and also applied the tort statute of limitations to personal injury claims brought under either theory.[155] This approach has the advantage of simplicity and of treating alike all actions for the same kinds of injury regardless of the caption and theory of the complaint. In effect, it merges the tort and warranty theories in personal injury suits. However, this arguably ignores the continued existence of the Code as a viable statute. The Oklahoma approach, on the other hand, recognizes that there is no *one* theory of products liability; rather there are several theories that are not necessarily mutually exclusive.[156] The Oklahoma view also applies the long-recognized policy of allowing plaintiffs to use whatever statute of limitations is most favorable to the maintenance of a cause of action.[157]

The view that favors applying the tort statute of limitations to all products litigation is based partly on the idea that the Code was not intended to cover "tort" damages, i.e., those awarded for personal injury or property damage. Rather, the Code was intended to apply to loss of profits or other expectations between parties in a commercial setting.[158] It has, however, been well observed by a leading commentator that the Code, though focusing on deals between business persons, also devotes specific attention to sales to ultimate consumers,[159] and that the Code is particularly concerned with personal in-

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privity in such matters, are Maly v. Magnavox Co., 460 F. Supp. 47 (N.D. Miss. 1978) (Mississippi law); Johnson v. Hockessin Tractor, Inc., 420 A.2d 154 (Del. 1980). Such holdings are criticized in Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 Mo. L. REV. 1 (1983). The author states that section 2-725 of the Code "is quite appropriate for a contract action but utterly unsuitable for a personal injury action." *Id.* at 11 n.49. *See* Murray, *Products Liability v. Warranty Claims: Untangling the Web*, 3 J.L. & COM. 269 (1983).

154. *See* Hester v. Purex Corp., 534 P.2d 1306 (Okla. 1975); Moss v. Polyco, Inc., 522 P.2d 622 (Okla. 1974). Rhode Island has adopted the same view: It has applied the tort statute to cases involving parties not in privity. Kelly v. Ford Motor Co., 110 R.I. 83, 290 A.2d 607 (1972). It has allowed use of the Code statute of limitations where the parties are in privity. Plouffe v. Goodyear Tire & Rubber Co., 118 R.I. 288, 373 A.2d 492 (1977) (warranty statute could be used as to retail dealer).

155. Heavner v. Uniroyal, Inc., 118 N.J. Super. 116, 286 A.2d 718 (1972). *See* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975) (statute on personal injuries applies to claims by remote users—i.e., those not in privity with defendant).

156. *See* Rivera v. Berkeley Super Wash, Inc., 44 A.D.2d 316, 354 N.Y.S.2d 654 (1974), *aff'd*, 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975). *See generally* Comment, *supra* note 3.

157. *See* Note, *Products Liability*, *supra* note 3.

158. *See* Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968). *See generally* McNichols, *supra* note 2, at 371, observing that the notion that the Code has to do primarily with commercial transactions involving a buyer and seller in privity of contract is the basis for the Oklahoma court's decisions in the statute of limitations cases.

159. Franklin, *supra* note 108, at 995.

jury problems.[160] The Code provides warranty liability, regardless of the type of harm that has occurred, in situations of privity and in those nonprivity situations specified in section 2-318, leaving the states free to allow or disallow other nonprivity liability for various types of harm.[161] Many states, including Oklahoma, have now chosen to develop *no* nonprivity liability in warranty, but still recognize the warranty action where there is privity. When the warranty recovery is then allowed, it is being allowed under the Code and thus it makes sense to apply the Code statute of limitations. Despite the presence of privity, and thus the possible use of the Code, the plaintiff also has the option of using the tort theory and its statutory period.[162]

Statutes of Repose

Although the breach of warranty action and its statute of limitations remain available to the plaintiff in some jurisdictions, most defective product cases are governed by the tort statute of limitations that ordinarily runs from the date of injury, and sometimes from a later date when the injury was discovered. This means that a cause of action may arise against a manufacturer or seller many years after that party has surrendered control of the product. Potential defendants believe this situation is unfair. Theoretically, even under strict liability in tort, there is a substantial burden on plaintiff: the burden of showing the product was defective when it left the defendant's hands. But in practice, if the product appears to have been defective when it injured the plaintiff, the defendant may find himself held liable unless he can establish that the defect was caused by some act that intervened between his control and the time of the accident. Therefore, defendants have lobbied for "statutes of repose" (or "statutes of ultimate repose") that set an outer limit on the period following a seller's surrender of control within which the sellers and manufacturers can be held liable. Some of these statutes were passed even before strict tort liability was adopted in a particular jurisdiction, but the legislation may nonetheless be broad enough to cover strict tort claims.[163] The statutes often set the outer limit in terms of a certain number of years from the first sale,[164]

160. *Id.*, citing U.C.C. §§ 2-318 & 2-719 (1977).

161. *See id.* at 999-1003.

162. *See* Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594 (1970).

163. *See* Cavan v. General Motors Corp., 280 Or. 455, 571 P.2d 1249 (1977); Johnson v. Star Mach. Co., 270 Or. 694, 530 P.2d 53 (1974), both applying to strict tort liability claims the Oregon statute, which provides that no action for negligent injury to persons or property shall be commenced more than ten years from the occurrence of the alleged act. *See generally* Note, *Statutes of Repose in Products Liability: The Assault upon the Citadel of Strict Liability*, 23 S.D.L. REV. 149 (1978).

164. *See* Ruiz v. Harris Corp., 532 F. Supp. 139, 141 (N.D. Ill. 1980), applying an Illinois law stating that no action could be brought more than "12 years from date of first sale, lease, or delivery of possession." *See generally* Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 1977 INS. L.J. 535; Note, *Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?*, 30 CASE W. RES. L. REV. 123 (1979).

or the original purchase,[165] of the product. These statutes are similar to statutes that have also been adopted in a number of jurisdictions that set a limit on the period of liability of those engaged in the design or construction of buildings.[166]

Statutes of repose have been held to apply even in the face of a defendant's ongoing duty to warn or to provide updated safety instructions or devices,[167] and may not be tolled by a disability, such as plaintiff's insanity, that would toll an ordinary statute of limitations.[168] The repose legislation obviously indicates a strong policy of putting an end at some point to possible litigation, despite this resulting in occasional unfairness to the injured parties. Thus, even in a jurisdiction that does not start the running of the regular statute of limitations until the defendant has been identified as the source of harm, a statute of repose will be held to have run from the date it specifies.[169] Sometimes a court may, even without legislation, apply a presumption that when an injury did not occur till long after sale of a product, the product must not have been defective when sold.[170]

Statutes of repose are, naturally, under sharp attack from the plaintiffs' bar. Possible responses to such attacks may be amendments to the legislation, creating exceptions for certain kinds of product-related injury, such as asbestosis, that are particularly unlikely to surface till long after sale of the product.[171] But broad constitutional attacks have also been mounted against these statutes.[172] Most frequently, constitutional arguments are based on state

165. *See* Baird v. Electro Mart Factory Direct, Inc., 47 Or. App. 565, 615 P.2d 335 (1980) (Oregon law; action must be commenced within two years of loss, which must have occurred within eight years of original purchase).

166. *See*, interpreting these statutes, Calendonia Community Hosp. v. Liebenberg Smiley Glotter & Assoc., 308 Minn. 255, 248 N.W.2d 279 (1976) (statute inapplicable to claims by owner of real property against those who contracted with such owner for design and construction of an improvement to the realty); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App. 1977), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977) (statute applied to claims against the defendant as installer of glass but not to claims against the defendant as manufacturer or seller of glass).

167. *See* Wilson v. Dake Corp., 497 F. Supp. 1339 (E.D. Tenn. 1980) (action had to be brought within ten years of first purchase for use or consumption, regardless of any duty to warn or to provide updated safety instructions or devices; applying Tennessee law).

168. *See* DeLay v. Marathon LeTourneau Sales & Serv. Co., 48 Or. App. 811, 618 P.2d 11 (1980), *aff'd* 630 P.2d 836 (insanity caused by the accident for which suit was brought would not toll statute of repose, though it might have tolled regular statute of limitations).

169. *See* Dortch v. A.H. Robins Co., 59 Or. App. 310, 650 P.2d 1046 (1982) (cause of action against manufacturer of intrauterine contraceptive device would accrue when physical injury occurred *and* the defendant was recognized as the source of the harm; but the action would be barred by the statute of repose if no action accrued within its eight-year period).

170. *See* Ford Motor Co. v. Broadway, 374 So. 2d 207 (Miss. 1979) (in strict liability action against manufacturer and seller of tractor, ten years' use without incident indicates that defect did not exist at time of sale).

171. *See* Murphree v. Raybestos-Manhattan, Inc., 696 F.2d 459 (6th Cir. 1982) (upholding and applying statutory amendment excluding asbestos-related disease actions from statute of repose; applying Tennessee law).

172. *See* Annot., 25 A.L.R. 4th 641 (1983). *See generally* McGovern, *supra* note 33.

guarantees of unrestricted access to courts, of due process, and of equal protection.

Authority dealing with the access-to-courts guarantee has generally found no denial of constitutional rights. Illinois has sustained such a statute against the "access" argument even where this had the effect of barring the claim of a minor.[173] It has been said that no one has a vested right in the common law rules on causes of action and that the legislature is thus free to modify or abolish those rules.[174] Florida upheld a statute of repose as applied to a claim that had accrued prior to the operative date of the legislation, where the statute gave a grace period in which the action could still have been brought even though the statute was in effect.[175] The court reasoned that the time in which the action could be brought was shortened but the action was not abolished. But in cases in which an action has been found completely barred by a fixed period of limitation from the date of sale, Florida *has* ruled this a violation of its constitutional provision guaranteeing access to the courts to all persons for the redress of any injury.[176] Thus, in one case a Florida court allowed an action brought twenty-three years after delivery to the original purchaser, reasoning that when the access-to-courts provision of the state constitution was adopted, the theories of recovery for negligence, warranty, and strict liability all were in existence and that the provision therefore protected the plaintiff's rights to bring actions on these theories.[177]

Statutes of repose were upheld against a due process attack in the same Illinois[178] and Indiana[179] cases that sustained those statutes against the access-to-courts argument. The Illinois court here faced a contention that the legislation was arbitrary because it applied only to actions based on strict liability in tort, not those grounded in negligence or warranty. The court rejected this argument on the basis of the heavier burden placed on sellers by strict tort liability, i.e., plaintiffs need not show lack of due care, nor are they bound by privity limitations. The court also rejected the argument that due process was violated because the statute barred actions for injuries even before the injuries had occurred, noting that the statute did not affect rights existing

173. Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

174. Dague v. Piper Aircraft Corp., 513 F. Supp. 19 (N.D. Ind. 1980), certified question answered, 275 Ind. 520, 418 N.E.2d 207 (1981) (plaintiff not in position of having had vested right taken from her since her cause of action had not yet accrued when statute of repose became effective).

175. Purk v. Federal Press Co., 387 So. 2d 354 (Fla. 1980).

176. Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981), *on remand*, 399 So. 2d 530 (Fla. Dist. Ct. App. 1981); Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980). *Cf.* Overland Constr. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979) (statutory ban on lawsuits brought more than twelve years after improvements made to realty violated constitutional provision on access to courts since it abolished common law and statutory right of action and was not based on an overpowering public necessity without any less onerous alternative).

177. Ellison v. Northwest Eng'g Co., 521 F. Supp. 199 (S.D. Fla. 1981) (applying Florida law).

178. Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981). *See* Bates v. Little Co. of Mary Hosp., 108 Ill. App. 3d 137, 438 N.E.2d 1250 (1982).

179. Dague v. Piper Aircraft Corp., 513 F. Supp. 19 (N.D. Ind. 1980).

when it came into operation. In a federal case applying Tennessee law,[180] the court also found no due process violation, reasoning that the huge increase in defective product claims made liability insurance for sellers very expensive and thus resulted in discouraging the production and sale of many products. The court concluded that the statute had been enacted for good reason and was not arbitrary. However, authority exists in North Carolina that legislation barring a hearing and remedy for injury after its infliction is similar to the infliction of punishment before or without a hearing, and that a statute of repose is thus on its face a denial of due process.[181] As the court there observed, there is considerable authority to the same effect invalidating legislation setting a fixed cutoff date as to claims against architects and building contractors.[182]

There is not yet a great deal of authority on equal protection arguments. Florida[183] and Indiana[184] cases have rejected this line of attack, finding the legislation to have a rational connection with a proper state objective. In light of the increasing number of products claims and the need to protect liability insurance companies, the Indiana court reasoned that any classification created by the statute was rational. New Hampshire, however, has invalidated a statute of repose as creating arbitrary categories of plaintiffs.[185]

Occasionally, various other lines of attack are mounted against statutes of repose, as in a federal case from Connecticut where the court invalidated such a statute on the ground it amended a statute of limitation so as to bar accrued causes of action not barred by the previous statute without providing a grace period.[186] In a federal case in Illinois, the defendants argued that the relevant statute of repose was the misguided result of intensive lobbying by the insurance industry.[187] The court, however, found that this argument provided no justification for overturning the judgment of the legislature.

Courts will normally reject a construction of a statute of repose that would result in its merely providing an alternative period of limitation, in addition to the regular statute of limitation, rather than its setting an absolute cutoff

180. Hawkins v. D & J Press Co., 527 F. Supp. 386 (E.D. Tenn. 1981).

181. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified on other grounds*, 306 N.C. 364, 293 S.E.2d 415 (1982) (the statute was not a statute of limitations, which cannot begin to run until plaintiff is entitled to institute an action when the alleged wrong has been completed).

182. *See* Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Loyal Order of Moose v. Cavaness, 563 P.2d 143 (Okla. 1977). *But see* Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Hill v. Forrest & Cotton, Inc., 555 S.W.2d 145 (Tex. Civ. App. 1977), upholding such statutes. *See generally* Comment, 18 CATH. U.L. REV. 361 (1969); Annot., 93 A.L.R.3d 1242 (1979).

183. Purk v. Federal Press Co., 387 So. 2d 354 (Fla. 1980).

184. Dague v. Piper Aircraft, 513 F. Supp. 19 (N.D. Ind. 1980).

185. Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983) (statute impermissibly discriminates between those injured by defective products and those injured in other ways).

186. Ferguson v. Sturm, Ruger & Co., 524 F. Supp. 1042 (D. Conn. 1981) (court said that presence of grace period would save statute from being unconstitutional).

187. Kline v. J.I. Case Co., 520 F. Supp. 564 (N.D. Ill. 1981).

date measured from the time of sale.[188] Some courts have thought the "alternative" interpretation would fly in the face of the clear legislative intent to place some absolute limit on the time within which sellers can be held liable.[189] One federal court interpreted Tennessee statutes that provided an action must be brought within six years from date of injury and in any event must be brought within ten years of the anticipated life of the product, whichever was shorter.[190] The court rejected the plaintiff's argument that the legislation established three separate periods of limitation, the longest of which would apply.[191] On the other hand, under some circumstances courts may accord a liberal, not literal, interpretation to statutes of repose in order to preserve causes of action. This is accomplished by applying the period of repose to the time between first purchase and *injury*, not the time between first purchase and filing of suit. For example, an Oregon case dealt with an eight-year statute of repose and a basic two-year statute of limitation.[192] Plaintiff was injured toward the end of the eight-year period and filed her complaint less than two years afterward. By the time she filed, however, the eight-year period of repose had expired. The plaintiff was nonetheless allowed to bring the action, the court finding that a strict construction would produce an unreasonable result. Statutes of repose also often do not deprive minors or incompetents of the grace period they are ordinarily given under other statutes for bringing their actions within a certain time of their attaining majority or mental competence.[193]

Statutes of repose are certainly more extreme in operation, hence more controversial, than ordinary statutes of limitation. Unlike the latter, they can have the effect of barring a lawsuit before its cause of action has accrued.[194] Pressure to adopt or retain them will undoubtedly continue as the creation of strict tort liability in the products field and the abolition of the privity requirement have increased the possibility of potential liability arising long after a product has been sold.[195] Repose statutes do not actually eliminate the possibility of successful actions brought long after the initial sale since these statutes do not necessarily apply to negligence actions. But in some jurisdictions, they *do* so apply; and in any case, the difficulty of proving

188. *See* Dague v. Piper Aircraft Corp., 513 F. Supp. 19 (N.D. Ind. 1980).

189. Amermac, Inc. v. Gordon, 182 Ind. App. 116, 394 N.E.2d 946, 948 n.4 (1979).

190. Hinton v. Tennessee River Pulp & Paper Co., 510 F. Supp. 180 (N.D. Ala. 1981) (applying Tennessee law).

191. *Id.* at 182.

192. Baird v. Electro Mart Factory Direct, Inc., 47 Or. App. 565, 615 P.2d 335 (1980).

193. *See* Tate v. Eli Lilly & Co., 522 F. Supp. 1048 (M.D. Tenn. 1981) (applying Tennessee law). *But see* DeLay v. Marathon LeTourneau Sales & Serv. Co., 48 Or. App. 811, 618 P:2d 11 (1980) (statute of repose not tolled by plaintiff's insanity). *Cf.* Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

194. *See* McGovern, *supra* note 33, distinguishing statutes of limitation and statutes of repose.

195. *See* Turner, *The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. & COM. 449 (1981); Comment, 32 BAYLOR L. REV. 137 (1980), both giving statistics on the ever-increasing amount of product-liability litigation.

negligence (especially many years after the fact) tends to limit the use of that theory. It has been hoped that repose legislation will result in substantial lowering of product liability insurance rates.[196] One commentator has expressed doubts that this sort of legislation has any significant impact on insurance costs, while noting that it may bar meritorious claims.[197]

Apart from the "insurance argument," statutes of repose do have their advantages[198]: by allowing potential defendants to plan ahead with more certainty, these statutes promote accuracy in determining the cost of potential liability; they eliminate evidentiary problems that would otherwise arise in suits brought years after sale of a product; and they reflect the conviction that long use of a product without incident is a strong indication the product was not initially defective. Since these statutes do occasionally have disastrous effects on meritorious claims, there has inevitably been some attempt to aid potential defendants and lower their insurance costs by a less extreme method. Among the alternatives suggested are the establishing of a useful safe life for each product, after which the seller would not be liable for harm caused thereby, and allowing manufacturers the total defense that a product reflected the state of the art when that product was produced.[199] The Model Uniform Product Liability Act adopts the "useful life" suggestion, though the Act couches it in terms of a presumption that does not arise in certain situations and that, in any case, may be rebutted by clear and convincing evidence.[200]

Conclusion

Statutes of repose surely run counter to the prevailing perception in the law that an action should not be barred prior to its accrual, or indeed prior to the time that the underlying injury was discovered. There is inherent unfairness in eliminating a plaintiff's cause of action before it arises. The grounds asserted in support of such statutes seem to be aimed at reducing the costs and inconvenience of sellers. Conceivably, this could aid prospective plaintiffs, and all society, by keeping those sellers solvent. However, the "delay" situation is only a small part of the problem faced by sellers who, even where a statute of repose is adopted, may still incur large liability in cases that quickly arise and are promptly litigated. It remains to be established that the alleviation of sellers' cost resulting from statutes of repose is worth so drastic a change in fundamental tort law.

A less drastic change, which would keep tort law intact and would also provide symmetry for all personal injury and property damage claims brought due to allegedly defective products, would be the elimination of the warranty statute of limitations as an alternative to the tort statute. Since the warranty statute is longer than the tort statute in absolute length (though not always

196. *See* Comment, *supra* note 195.

197. *See* Turner, *supra* note 196, at 459-60.

198. *Id.* at 458-59.

199. *Id.* at 479.

200. MODEL UNIF. PRODUCTS LIABILITY ACT, 44 Fed. Reg. 62,732 (1979), *reprinted in* Turner, *supra* note 196, at 457 n.57, discussed in McGovern, *supra* note 33, at 426-27.

in application to a particular case), the elimination of this statute in tort cases would give sellers some degree of relief. More important, those courts that have adopted this approach treat all tort actions the same regardless of the caption of the complaint. The applicable law depends on the nature of the injury, not the legal theory for relief. The chief objection to this approach is that it ignores the existence of the Uniform Commercial Code and the literal application of its terms, as well as the application intended by its drafters to tort cases, at least where there is privity between the parties. But the Code's warranty statute, with its possible requirement of privity and its limitation period measured from the date of sale, is a throwback to days when tort law had not developed an effective remedy for product claims. If the "fall of the citadel" of privity is now complete in tort law,[201] strict tort recovery can provide an adequate remedy throughout the field of defective product litigation. Retaining a possible remedy under the Uniform Commercial Code merely promotes *lack* of uniformity, since it leads to a different treatment of identical causes of action depending on whether they are brought under a tort or a warranty theory. It also leads to a resurrection, for statute-of-limitations purposes, of the old distinction, now rejected as irrelevant in other contexts, between privity and nonprivity situations. The intent of the Code's drafters may indeed have been to cover tort as well as commercial losses. Courts today should look to the rationale behind that intent—the need to provide an effective remedy not then available in tort. The common law of tort has grown, and that gap no longer exists. Surely, policy based upon a now abolished shortcoming should not be allowed to prevail over the primary intent behind the Code—establishing uniform treatment of similar causes of action. Where tort injury—personal harm or property damage—is alleged, the tort statute of limitations should be the only applicable limitation statute.

201. As described in Prosser, *supra* note 135. *See* Miller, *supra* note 136, at 412-13 & n.6.